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IN THE

# Supreme Court of the United States

KATURIA SMITH, ANGELA ROCK, AND MICHAEL PYLE,

*Petitioners*,

v.

THE UNIVERSITY OF WASHINGTON LAW SCHOOL, WALLACE D. LOH, ROLAND HJORTH, SANDRA MADRID, AND RICHARD KUMMERT,

*Respondents*.

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*On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit*

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is "academic freedom" or "diversity" a compelling governmental interest sufficient to meet strict scrutiny and to justify race-based preferences in admissions to a state law school under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does an admissions system that uses such race-based preferences violate Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) or 42 U.S.C. § 1981?

## PARTIES TO THE PROCEEDING

Petitioners are Katuria Smith, Angela Rock, and Michael Pyle. They were plaintiffs in the District Court and appellants in the Court of Appeals.

Respondents are The University of Washington Law School, Wallace D. Loh, Roland Hjorth, Sandra Madrid, and Richard Kummert. They were defendants in the District Court and appellees in the Court of Appeals.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (App. 1a-25a) is reported at 233 F.3d 1188. The decision of the District Court (App. 28a-40a) denying plaintiffs' motion for partial summary judgment was unreported. An earlier decision of the district court, granting plaintiffs' motion for class certification and denying several of defendants' motions for summary judgment, is reported at 2 F. Supp. 2d 1324.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 2000.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

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[1] On January 11, 2001, the Ninth Circuit (Fernandez, J.) issued an order stating that a judge of the court had made a *sua sponte* call for rehearing *en banc* and asking the parties to submit papers on the propriety of *en banc* rehearing on or before January 31, 2001. The court has not yet ruled on rehearing the case. Under Rule 13.3 of this Court, the time for petitioners to file this petition was not tolled because there has been no "petition for rehearing . . . filed in the lower court by any party." Sup. Ct. R. 13.3.

2. Title VI of the Civil Rights Act of 1964 states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

3. 42 U.S.C. § 1981(a) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . .

## STATEMENT

This case presents the question of whether the admissions system for a state university law school can give race-based preferences to certain applicants in an effort to achieve a "diverse" student body. The Fifth and Ninth Circuits have split on this issue of profound national importance.

### A. FACTUAL BACKGROUND

This case involves three white residents of the State of Washington whose applications to the state law school were rejected in the years 1994, 1995, and 1996.

1. *Defendants*. -- Defendant University of Washington Law School (the "Law School") is a state-run

law school that receives federal funds. Pretrial Order, Admitted Facts, ¶ 7.

Each of the individual defendants Wallace Loh and Roland Hjorth was dean of the Law School during a relevant period. Richard Kummert was actively involved in the admissions process for the Law School since 1965 and had served as chair of the Law School's Admissions Committee during the years that plaintiffs applied to the Law School. Sandra Madrid was Assistant Dean of the Law School, and had responsibility for the administration of the admissions system. App. 3a n.2; Loh Decl. Filed 1/29/98 ¶ 2; Hjorth Decl. Filed 10/31/97 ¶ 1; Kummert Aff. Filed 10/31/97 ¶ 1; Madrid Decl. Filed 1/29/98 ¶ 1.

2. *The Law School's Admissions System.* -- There were disputed facts concerning the operation of the Law School's admissions system in the years 1994, 1995, and 1996 in the trial court. The following description, however, is taken from stipulated facts and defendants' own testimony.

The written admissions policy adopted by the Law School in late 1989 was in effect during the years that plaintiffs applied. Kummert Decl. Filed 12/23/97, Ex. 1 pp. 7-8. Under that policy, the Law School considers race as a factor in admissions, but not as a means of remedying the present effects of its own past discrimination. It does not limit its consideration of race to applicants who are members of groups that have been the victims of state-sanctioned discrimination. App. 36a n.4. Pretrial Order, pp. 2-3 (stipulated facts).

In the two years prior to that 1989 adoption, the Law School's offers to non-whites constituted 16% and

20% of all offers. In the next six years, the percentage of offers to non-whites stayed within fairly close parameters: between 30% and 38% of all offers. Rosman Statement Filed 12/17/98, Ex. D. In 1996, it dropped slightly to 27%. *Id.* ¶ 2.

The 1990 census indicates that the minority population of the State of Washington was 13.5%. *Id.*, Exs. G, H (Reqs. To Admit Nos. 1-4). Estimates for 1994 by the Census Bureau indicate that the minority population had increased to 15.2%. *Id.*, Exs. G, H (Reqs. To Admit Nos. 12-15). Thus, throughout the 1990's the proportion of minorities among those offered admission to the Law School has been far greater than their proportion of the population of the State of Washington.

Upon receipt of completed applications, the Law School uses an index, a weighted average of undergraduate grade point average and LSAT scores, to order the applicants. *Smith v. University of Washington Law School*, 2 F. Supp. 2d 1324, 1329 (W.D. Wash. 1998). The highest ranking applicants, referred to as "presumptive admit" candidates, were reviewed by Admissions Coordinator Kathy Swinehart, who would recommend that the candidate be admitted or held for further review. Her decisions were reviewed by defendant Kummert. *Id.* According to the Law School, applicants in this category were held for further review if their "academic potential" appeared to be less than that indicated by their index score or if they lacked a "diversity" factor as described in the Law School's admissions policy. *Id.*; Kummert Decl. Filed 12/23/97, Ex. 1, p. 11.

In 1994, the remaining candidates (those with Index scores below 197) were divided into "Admissions Commit-

tee" files and "presumptive denial" files. *Smith*, 2 F. Supp. 2d at 1329; Kummert Aff. Filed 10/31/97 ¶ 6. White candidates at Index levels 195 and 196 were set aside for review by the Admissions Committee; minority candidates at those levels were reviewed by defendant Madrid. Kummert Decl. Filed 12/17/98 ¶ 4; Madrid Decl. Filed 12/17/98 ¶ 7. The "presumptive denial" candidates (those with Index scores below 195) were all reviewed by defendant Madrid, who had the authority to admit such candidates, hold their applications for further review by the Admissions Committee, or deny their applications. *Smith*, 2 F. Supp. 2d at 1329. Her decisions were reviewed by defendant Kummert. *Id.* Those admitted directly by Madrid from the "presumptive denial" category in 1994 were substantially all minorities. Rosman Statement Filed 1/8/99, Ex. 12 (Kummert Depo. Tr. 166, 177). Only whites and Asians were referred for further review. *Id.* (Kummert Depo. Tr. 169).

In 1995 and subsequently, Madrid would read all the files outside of the "presumptive admit" category. She had the same authority to admit, deny, or hold for further review. *Smith*, 2 F. Supp. 2d at 1329.

Throughout the years at issue, when applicants from preferred races submitted applications that did not sufficiently identify their "diversity," defendants would send those applicants a letter seeking additional information about their "family background" and "cultural activities and associations." The letter was sent *only* to non-white applicants. Defendants never sent out any other letter seeking additional information about "diversity" to whites. Rosman Statement Filed 1/8/99, Exs. 8, 13 (Madrid Depo. Tr. 71), and 14 (Swinehart Depo. Tr. 59-60).

In the spring of 1994, the Law School adopted a goal of having each admitted class consist of students 70-75% of whom were residents of the State of Washington. *Id.*, Ex. 7. Even prior to that time, residency was considered as a positive factor at various points in the admissions process. *Id.*, Exs. 12 (Kummert Depo. Tr. 171), and 14 (Swinehart Depo. Tr. 53-55).

Both Kummert and Madrid asserted that they used the admissions criteria set forth in the Law School's policy, which, as noted, was adopted in 1989 and considers race as a positive "diversity" factor.

3. *Plaintiffs' Applications*. -- Katuria Smith applied in 1994. Earlier, she had asked for a waiver of the fees to apply to the Law School, and provided documentation of her minimal income. The Law School states that it will grant a "limited number of fee waivers . . . for those who would not otherwise be able to apply." Rosman Statement Filed 1/20/98, Ex. 9, p. 10. It granted Smith's application for a fee waiver. *Id.*, Exs. 21-22.

Smith's application was unusual. Rosman Statement Filed 1/8/99, Ex. 4. After several years in community colleges, she transferred to the undergraduate business program at the University of Washington ("UW"). Although UW was obviously a far more academically rigorous program, Smith did *much* better there than she had at the community colleges. Although her overall GPA was a 3.28, she had a GPA of 3.62 at UW. Her LSAT score was in the 94th percentile, and she had an index score of 192. *Id.* In 1994, all resident African American and Filipino American applicants with an index score above 177 were offered admission. Rosman Statement Filed 12/17/98, Ex. F, ¶¶ 1-2.

Smith's application explained that she had worked full-time during most of the time she was in community colleges, until she switched to part-time work just prior to her transfer. Rosman Statement Filed 1/8/99, Ex. 4. (In her last semester at a community college, working "only" part time, she earned a 3.89 GPA.) She noted that her father was dead, that her mother had three other children, and that she had no means of supporting herself other than working. Accordingly, she continued to work 20-25 hours per week even after transferring to UW. *Id.*

Smith submitted a glowing recommendation from her employer (an attorney). Her other recommender (a professor at UW) thought it sufficiently important to write that she "has worked very hard under very difficult circumstances to get to this point"; that she was "truly a much better student than her cumulative GPA suggests"; and that she "had always had to work many hours outside of school to support herself." He also extolled her initiative and determination. *Id.*

Defendant Kummert, the admissions chair, testified that Smith's application did not demonstrate any characteristics that would warrant consideration under the Law School's existing diversity policy. Kummert Aff. Filed 10/31/97, ¶ 10. The Law School rejected Smith's application in March 1994. As a consequence, Smith attended a more expensive private law school and suffered damages as a consequence. Am. Compl. ¶ 4; Answer ¶ 4.

Angela Rock applied in 1995. She had an LSAT score in the 93rd percentile, and a GPA from the University of Washington of 3.65. Rosman Statement Filed 1/8/99, Ex. 5. Her "Index score" of 196 was a "presumptive admit" score for Washington residents in 1995. Kum-

mert Decl. Filed 12/17/98 ¶ 2. All resident African American, Asian American, and Hispanic applicants with index scores above, respectively, 175, 190, and 187 were offered admission in 1995. Rosman Statement Filed 12/17/98, Exs. E, F (Reqs. To Admit Nos. 23, 28, 31).

Rock's application spoke about having been a swimming coach in a depressed, gang-infested ghetto area of Spokane and about how that experience had changed her and her perspective. She also identified the other jobs she held while attending college. Rosman Statement Filed 1/8/99, Ex. 5.

Kummert testified that Rock's application did not demonstrate any information that would warrant consideration under the Law School's existing diversity policy. Kummert Aff. Filed 10/31/97, ¶ 13. The Law School placed Rock on a waiting list in March 1995 and rejected her application in August 1995. Rosman Statement Filed 1/8/99, Ex. 5. As a consequence, Rock attended a more expensive private law school and suffered damages.

Michael Pyle applied in 1996. Rosman Statement Filed 1/8/99, Ex. 6. He had graduated in 1991 from Duke University with a 3.15 GPA in Mechanical Engineering, and had scored in the 97th percentile on the LSAT when he took it in 1995. *Id.* In 1996, the Law School switched from three-digit index scores to two-digit scores, and Pyle's was 89. *Id.* All Filipino and Native American resident applicants with an index score above 83, and all Hispanic resident applicants with an index score above 87 were offered admission in 1996. Rosman Statement Filed 12/17/98, Exs. E, F.

Pyle's application spoke at length about his job

for the previous years working as a structural analyst at the Boeing Co. Pyle also wrote about how he had come to terms with his homosexuality and how that experience had sensitized him to the experiences of other groups that have traditionally been the victims of irrational discrimination. Rosman Statement Filed 1/8/99, Ex. 6.

Kummert testified that Pyle's application did not contain any information that would warrant consideration under the Law School's existing diversity policy. Kummert Aff. Filed 10/31/97, ¶ 17. The Law School does not give weight to sexual orientation in its diversity policy. Rosman Statement Filed 1/8/99, Exs. 13 (Kummert Depo. Tr. 229), 14 (Madrid Depo. Tr. 89). The Law School rejected Pyle's application in March 1996. Pyle reapplied to the Law School in 1999 and was admitted. App. 4a. Due to positive developments in his career, however, he chose not to matriculate.

## B. PROCEEDINGS BELOW

This action commenced on March 5, 1997 with the filing of the original complaint. The original complaint, like the consolidated and amended complaint filed in July 1997, asserted that defendants operated an admissions system at the Law School that illegally discriminated on the basis of race in violation of 42 U.S.C. §§ 1981, 1983, and 2000d. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

In November 1998, the people of the State of Washington passed Initiative I-200. In relevant part, that initiative stated:

> The state shall not discriminate against, or grant

> preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

As passed, I-200 was codified as a statute at Section 49.60.400 RCW. Pursuant to the Washington Constitution, it can now be amended by a simple majority vote of the legislature. Wash. Const. Art. 2, § 41.

On November 19, 1998, defendants moved to dismiss plaintiffs' requests for declaratory and injunctive relief on the ground that I-200 rendered them moot. The District Court granted that motion on February 10, 1999, noting that plaintiffs' claims for damages remained.

Pursuant to the trial court's scheduling order, both sides moved for summary judgment on December 17, 1998. Plaintiffs' motion for partial summary judgment on liability was based upon the undisputed fact that defendants considered race and ethnicity in the Law School's admissions process and purported to do so for the purpose of achieving "educational diversity" pursuant to its academic freedom; plaintiffs argued that "diversity" and "academic freedom" were not compelling governmental interests sufficient to justify the use of race in admissions. Defendants' motion argued that they had complied with the requirements of Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1977), that the individual defendants had qualified immunity, and that the Law School had not engaged in "intentional" discrimination in violation of Title VI.

The District Court denied both sides' motions. The trial court concluded Justice Powell's opinion in *Bakke*,

asserting that "academic freedom" and/or "diversity" were compelling governmental interests, stated the rationale for that part of the holding of the Court in that case approving the future consideration of race. In so doing, the trial court applied the Supreme Court's analysis in *Marks v. United States*, 430 U.S. 188 (1977) for interpreting decisions of a fragmented court, and specifically rejected the holdings of a number of circuit courts that *Marks* cannot be applied unless there is a "common denominator" among the various opinions in the Supreme Court decision being analyzed. App. 32a. While conceding that "[t]he application of the *Marks* principle to the *Bakke* decision is particularly vexing because in many ways the opinions of the Justicies are at odds with each other" (*id.*), the court nonetheless held that Justice Powell's opinion was the "narrowest" and, thus, the rationale for the part of the holding in *Bakke* that approved the use of race.

The parties stipulated that this order met the requirements of 28 U.S.C. § 1292(b), *i.e.*, it involved a controlling question of law as to which substantial grounds for disagreement existed and the resolution of which could materially advance the ultimate termination of the litigation. The District Court agreed, and signed an order to that effect on February 22, 1999. App. 26a-27a. That order also stayed the trial pending further order of the court. The Ninth Circuit Court of Appeals accepted plaintiffs' Section 1292(b) appeal and affirmed in a decision dated December 4, 2000. Like the District Court, the panel concluded that Justice Powell's rationale was the rationale for this Court's judgment in *Bakke*. Specifically, the panel gleaned four distinct principles from Justice Powell's opinion: (1) strict scrutiny applies to racial classifications, (2) racial proportionalism (*i.e.*, insuring some proportion of a particular race or races) was not proper,

(3) the state can remedy the effects of past identified discrimination where there have been findings of past violations, and (4) using racial preferences to attain a diverse student body is a constitutionally permissible goal for an institution of higher education. App. 15a-17a.

The court contrasted this with the approach taken by Justices Brennan, White, Marshall, and Blackmun (the "Brennan concurrers"). The opinion joined by those four Justices would have relied upon Justice Powell's third principle, but did not agree to Justice Powell's limitation of that principle to instances where institutional discrimination was supported by findings. The panel correctly concluded that those Justices "would have established a principle broader than the [t]hird principle because they would have allowed individual institutions or departments to ameliorate societal discrimination, even without specific judicial, legislative, or administrative findings at the proper level." App. 20a.

But the panel also concluded that the concurrers' expanded third principle was broader than Justice Powell's *fourth* principle (concerning "diversity" or "academic freedom"). The panel conceded that the Brennan concurrers "did not specifically say that 'race' could be used to achieve student body diversity in the absence of any societal discrimination." App. 23a. But they "could hardly doubt" that the Brennan concurrers "*would have* embraced that somewhat narrower principle if need be, for [they] thought that it was simply an allotrope of the principle [they were] espousing." *Id.* (emphasis added).

Applying *Marks v. United States*, 430 U.S. 188 (1977), the panel concluded that Justice Powell's rationale was narrower than the rationale employed by the Brennan

concurrers and was thus the rationale for the Court's judgment. Accordingly, it affirmed the denial of plaintiffs' motion for partial summary judgment.

## REASONS FOR GRANTING THE WRIT

This case involves the use of racial preferences in admissions to higher education. There are few, if any, legal issues more significant. *Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg and Souter, JJ.) ("Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance"). Moreover, as the decision in this case specifically noted, the Fifth and Ninth Circuits have split on the question of whether "academic freedom" or "diversity" is a compelling governmental interest sufficient to justify the use of race preferences in admissions. *See* App. 24a n.9 (noting disagreement with Fifth Circuit).

There are also a host of subsidiary questions that are encompassed by the primary question for review, and some of these subsidiary questions have also produced mixed answers in the lower courts.

### A. THE *BAKKE* CASE

In *Bakke*, this Court found that the admissions program of the University of California Medical School at Davis, which set aside 16% of the places for incoming students for educationally or economically disadvantaged minorities, violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Justice Powell concluded that Title VI prohibited only that conduct prohibited by the Constitution, but that the justifications offered by the

Regents were insufficient and/or the system employed by the Davis Medical School was not "narrowly tailored" to meet those justifications. Justice Stevens, writing for himself and three others, concluded that the system of racial preferences employed by the Davis Medical School violated the plain language of Title VI. Those Justices did not reach the question of whether the Davis system also violated the Constitution.

Justice Powell also concluded that the injunction imposed by the California Supreme Court, prohibiting all use of race in admissions in the future, should be reversed. In this conclusion, he was joined by the Brennan concurrers (who also would have upheld the system employed by the Davis Medical School).

Justice Powell applied strict scrutiny to the Davis program. He concluded that "academic freedom," although not a specifically enumerated Constitutional right, was a "special concern" of the First Amendment and thus a sufficiently compelling interest to meet strict scrutiny. *Bakke*, 438 U.S. at 312 (Powell, J.). "Academic freedom" included the freedom to determine who would be allowed to study at a state university. *Id.* The Regents specifically wanted their institutions to select a group of students who would contribute to a robust exchange of ideas, and argued that "ethnic diversity" was a means of achieving that goal. *Id.* at 313. While rejecting the argument that Davis's specific program of reserving spaces for disadvantaged minorities was necessary to achieve the robust exchange of ideas that the Regents allegedly wanted, Justice Powell did state that race and ethnicity could be considered as "plus" factors by universities seeking to achieve that goal. Justice Powell opined that a state interest in a robust exchange of ideas would not justify the

consideration of race to achieve the ethnic diversity promoted by UC Davis, but could justify its consideration to achieve a diversity which "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315.

Although the Brennan concurrers (Justices Brennan, Marshall, Blackmun, and White) seemingly rejected "strict scrutiny" (*Bakke*, 438 U.S. at 357 (Brennan, J. dissenting in part, concurring in part)), they borrowed a scrutiny level from gender-discrimination cases that they characterized as "strict and searching." *Id.* at 362. Specifically, they required the use of race to serve important governmental objectives and to be substantially related to achieving those objectives. *Id.* at 359. They asserted that such scrutiny was appropriate because it is difficult to distinguish between uses of race that seek to remedy the effects of past discrimination and those that seek to stigmatize, and because race-based classifications were inconsistent with the traditional belief that people should be judged on the basis of *individual* merit. *Id.* at 360-61.

The Brennan concurrers concluded that the Davis program met their "strict and searching" scrutiny analysis because remedying the effects of past societal discrimination was a sufficiently important governmental objective, and because the Davis program was, in their view, substantially related to achieving that objective. In reaching the latter conclusion, the Brennan concurrers stated that remedies for past discrimination need not be limited to victims identified by specific proof, but that they should be limited to those "within a general class of persons likely to have been the victims of discrimination." *Id.* at 363. In finding that the Davis program met that requirement, the

Brennan concurrers emphasized:

> [T]he Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program . . . [S]pecific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great.

*Id.* at 377-78. *Cf. Bakke*, 438 U.S. at 275 n.4 (Powell, J.) (the admissions chairman would confirm "disadvantage" of individual applicants).

The Brennan concurrers also found that the constitutionality of the Davis program "is buttressed by its restriction to only 16% of the positions in the Medical School, a percentage less than that of the minority population in California." *Id.* at 374 n.58. While the opinion stated that that benchmark was not necessarily a constitutional one, it also made clear that the *Bakke* case did not raise the question of a program which admitted racial minorities "in numbers significantly in excess of their proportional representation in the relevant population." *Id.* Such programs, the Brennan concurrers noted, "might well be inadequately justified by the legitimate remedial objectives." *Id.*

## B. THE LOWER COURTS ARE SPLIT

In *Adarand Constructors v. Pena*, 515 U.S. 200, 218 (1995), this Court accurately noted that "*Bakke* did not produce an opinion for the Court." Accordingly, there has been no settled interpretation of its holding, and, not surprisingly, the lower courts have not agreed on the proper way to interpret the 1-4-4 breakdown of Justices in *Bakke* or whether "academic freedom" or "diversity" is a compelling governmental interest. As described above, the Ninth Circuit in this case concluded that Justice Powell's opinion in *Bakke* was the "narrowest" and therefor the rationale for the judgment of the Court.

In contrast, the Fifth Circuit has concluded that Justice Powell's opinion in *Bakke*, and his endorsement of "academic freedom" and "diversity" as compelling governmental interests sufficient to meet strict scrutiny, was not the rationale for the judgment of the Court (or the rationale for that part of Justice Powell's opinion, V-C, that reversed the California Supreme Court's injunction). *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996). That Court held that Justice Powell spoke for no other Justice, and that the Brennan concurrers had implicitly rejected diversity as a compelling governmental interest. *Hopwood*, 78 F.3d at 944 (citing *Bakke*, 438 U.S. at 326 n.1 (Brennan, J., dissenting and concurring)). *See also Hopwood v. Texas*, 236 F.3d 256, 274-75 (5th Cir. 2000) (the four Brennan concurrers in *Bakke* "disagreed with [Justice Powell] as to the rationale that is necessary to justify constitutionally the government's use of racial preferences. . . . None of the [concurrers] would go the extra step proposed by Justice Powell and approve student body diversity as a justification for a race-based admission criterion").

Concluding that the question of whether "diversity" was a compelling governmental interest was not determined by this Court's precedents, the Fifth Circuit decided that giving *all* members of a racial minority a "plus" constituted improper racial stereotyping inconsistent with the underlying principles of equal protection. *Hopwood*, 78 F.3d at 945-46. That court also noted that the First Amendment, in which Justice Powell located the principles of academic freedom upon which he relied, is usually considered a shield for individuals against the state, not a sword to be used by state-run institutions to discriminate. *Hopwood*, 78 F.3d at 943 n.25.

Other courts have simply noted that this Court has not resolved the issue of whether "diversity" or "academic freedom" is a compelling governmental interest sufficient to support race preferences in admissions. *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 130 (4th Cir. 1999) ("whether diversity is a compelling governmental interest remains unresolved"); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998) ("whether [non-remedial] justifications are possible is unsettled"). Many academics have also concluded that there is no rationale for the judgment in *Bakke*. Gabriel Chin, *Bakke To The Wall: The Crisis of Bakkean Diversity*, 4 Wm. & Mary Bill of Rights J. 881, 925-26 n.192 (1996) (listing such academics).

District courts have also split on this question. In *Johnson v. Bd. of Regents of the University System of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000), the Court considered the system of undergraduate admissions at the University of Georgia. After a number of students were admitted based solely on grades and SAT scores, the school would recalculate each student's "index" by consid-

ering some fifteen factors (including summer employment, extracurricular activities, and whether the student would be a first-generation college student), the most heavily-weighted of which was race. *Id.* at 1365; *Wooden v. Bd. of Regents of the University System of Georgia*, 32 F. Supp. 2d 1370, 1375 & n.5 (S.D. Ga. 1999). The school would then admit students based upon this revised index.

The district court concluded that Justice Powell's view as to the validity of a "Harvard plan" was *dicta* because such a plan was not before this Court; like the Fifth Circuit, it also concluded that the "use of a Harvard Plan admissions scheme for non-remedial purposes gained the support of no other Justice, much less a majority." *Johnson*, 106 F. Supp. 2d at 1369. *Cf. Peters v. Moses*, 613 F. Supp. 1328, 1335 (W.D. Va. 1985) ("I do not believe that Justice Powell's concurring opinion represents the court's opinion in *Bakke* with regard to this matter"). Considering the question open (*Johnson,* 106 F. Supp. 2d at 1371), the court reviewed subsequent cases of this Court and concluded that they disfavored rationales for racial preferences that had no temporal or other stopping point. Finding that "student diversity" was just such a rationale, was indistinguishable in practice from a goal of racial proportionalism, and stereotyped the views of racial minorities, the court held that UGA's admissions system violated Title VI and the Constitution. *Id.* at 1371-75.

In contrast, in *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), the court upheld a similar system used by an undergraduate school of the University of Michigan. Admissions counselors added twenty points to the files of members of "underrepresented" races -- the decision does not identify those races -- pursuant to a system in which those counselors also added points to files

for various other factors, including geography, alumni relations, athletic ability, socioeconomic status, and leadership skills. *Id.* at 827. (An outstanding essay, for example, was worth three points. *Id.* at 829.)[2]

The court in *Gratz* recognized that "diversity in higher education, by its very nature, is a permanent and ongoing interest" and that "the need for diversity lives on perpetually." *Id.* at 823-24. Nonetheless, it reviewed the relevant cases and concluded that no case precluded the finding that diversity is a compelling governmental interest, and that, thus, "if presented with sufficient evidence regarding the educational benefits that flow from a diverse student body, there is nothing barring the Court from determining that such benefits are compelling . . . ." *Id.* at 822. Reviewing the evidence presented on defendants' motion for summary judgment, the court concluded that the evidence was compelling and that it would thus consider diversity to be a compelling governmental interest.

In addition to being an important issue, and one on which the courts have split, the issue of whether diversity is a compelling governmental interest is also key to this

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[2] While the court upheld the system described in the text, used during the 1999 and 2000 admissions seasons, it declared the systems used from 1995 to 1998 unconstitutional. Those systems created "protected" or "reserved" seats for underrepresented minorities to ensure that the college's rolling admissions system did not undermine its enrollment targets. Curiously, the court distinguished between the two admissions systems despite the fact that the defendants themselves stated that there was no substantive difference between the two. *Id.* at 827 & n.16. *Cf. Bakke*, 438 U.S. at 379 (Brennan, J., concurring and dissenting) (no basis "for preferring a particular preference program simply because in achieving the same goals that [Davis] is pursuing, it proceeds in a manner that is not immediately apparent to the public").

case. That is why *all* parties, and *both* courts below, agreed that 28 U.S.C. § 1292(b) was applicable to the order that denied plaintiffs' motion for summary judgment. That statute, of course, applies only to "controlling" issues of law as to which there are substantial grounds for disagreement, and the resolution of which could materially advance the ultimate termination of the litigation. Plainly, the question of whether "academic freedom" or "diversity" is a compelling governmental interest is such a question. Currently, this case will be remanded for a trial on whether those were defendants' actual objectives and whether the admissions system in 1994-96 was narrowly tailored to meet those objectives. That trial will be unnecessary if this Court concludes that the lower courts erred. *See, e.g., Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (hearing an appeal from interlocutory order denying motion to dismiss); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (hearing appeal from order of Fifth Circuit reversing district court order that had been certified for interlocutory appeal); *Ohio Citizens for Responsible Energy v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J.) ("certiorari review of interlocutory orders of federal courts is available, *see* 28 U.S.C. §§ 1254(1) and 1292").

## C. THIS COURT CAN RESOLVE OTHER ISSUES RELATED TO THE USE OF RACE IN ADMISSIONS

Even assuming that Justice Powell's opinion in *Bakke* was the rationale for the judgment of this Court in that case, many of its points could be clarified and/or reconciled with other precedents of this Court. Among those are the following.

1. *Academic Freedom Or Diversity?* -- As noted previously, Justice Powell concluded that "academic freedom" was a governmental interest sufficient to justify the use of race preferences because it entailed a university's freedom to select its own student body. Nonetheless, he concluded that universities only had the "academic freedom" to choose "intellectual diversity," in which race could play a role, but that the university could not pursue racial diversity directly or as a goal in itself.

But academic freedom, and the First Amendment generally, protects all *ideas* equally. If racial preferences can be used to *implement* those ideas, then they should be available to implement any idea that academic freedom protects, including the idea that racial proportionalism *itself* fosters a better academic environment. Moreover, if some less-enlightened school concludes that "homogeneity," rather than "diversity," fosters better educational results -- because it lessens racial tensions, for example -- it should be able to implement that idea with racial disadvantages ("minuses") consistent with Justice Powell's vision of "academic freedom" as a justification for race-conscious decision-making. Other than Justice Powell in *Bakke*, no member of this Court has ever suggested that the First Amendment encompasses the right of state institutions to discriminate. *Cf. Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (no First Amendment right for private school that promoted segregationist views to exclude racial minorities).

Justice Powell also emphasized the widely-held nature of the belief concerning "diversity." *Bakke*, 438 U.S. at 312 (an atmosphere of speculation, experiment, and creativity is "*widely believed* to be promoted by a diverse student body" (emphasis added)); *id.* at 313 ("our

*tradition and experience* lend support to the view that the contribution of diversity is substantial" (emphasis added)). But the First Amendment protects minority views, as well as majority; widely-held views, and those only believed by a few. The "academic freedom" to imitate Harvard is not the "academic freedom" our First Amendment protects.

2. *Issue of Fact or Issue of Law?* -- Closely related to the "academic freedom" issue is whether defendants must actually demonstrate the value of diversity. It seems fairly clear that Justice Powell did not think so, since there was no actual evidence by which he concluded that diversity would foster a better intellectual environment. Rather, as the quotes in the last paragraph indicate, it was sufficient that college administrators believed in these beneficial effects. *See also, e.g., id.* at 314 ("[a]n otherwise qualified medical student with a particular background . . . *may* bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body" (emphasis added)).

The Ninth Circuit seemed to agree, and treated the question as one of law. As already mentioned, though, the district court in *Gratz* appeared to view the value of diversity as an open question to be determined by the trier of fact.

3. *Diversity, Racial Diversity, and Racial Proportionalism.* -- While Justice Powell's opinion in *Bakke* seemed to reject a diversity based solely on race, not all college administrators or courts have viewed it that way. *See Johnson*, 106 F. Supp. 2d at 1371 ("The record shows that UGA is plying a 'diversity = proportionalism' rationale"); *Gratz*, 122 F. Supp. 2d at 819 (relying on Justice Powell's opinion in *Bakke*, University contends that

it has "a compelling governmental interest in the educational benefits that flow from a racially and ethnically diverse student body"). *See also* Transcript of Oral Argument in *Gratz v. Bollinger*, 11/16/2000, p. 39 (University attorney: "I don't think there's any question but that what Justice Powell is talking about in *Bakke* is racial and ethnic diversity, not viewpoint diversity"); *id.* at 49 (same).

What "racial diversity" really means, and how it differs from the desire to have a particular proportion of a given race (or races) in the student population -- which Justice Powell roundly condemned as "discrimination for its own sake" (*Bakke*, 458 U.S. at 307) -- is unclear. This case presents this Court with an opportunity to clarify the relationship between various kinds of "diversity."

4. *Level of Scrutiny*. -- Towards the end of his *Bakke* opinion, Justice Powell asserted that, while "[a] facial intent to discriminate . . . is evident" in the program operated by the Davis Medical School, "[n]o such facial infirmity exists in an admissions program where race or ethnic background is simply one element -- to be weighed fairly against other elements -- in the selection process." *Bakke*, 438 U.S. at 318 (Powell, J.). According to Justice Powell, a "court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system" because "good faith would be presumed." *Id.* at 318-319.

Justice Powell further stated that universities

> may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So

> long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process.

*Id.* at 319 n.53.

It is unclear why Justice Powell believed that a "plus" system -- perhaps granting "points" to members of some races, but not others, as in Georgia and Michigan -- does not evidence a facial intent to discriminate. *Cf.* App. 4a (referring to defendants' "overt racial policy"). Applicants of certain races receive an advantage, and members of other races do not. Nonetheless, Justice Powell's "presumption of legality" suggests that racial preferences in such a system would not be subject to "strict scrutiny." Indeed, the defendants in this case made precisely this argument. Rosman Statement Filed 2/25/98, Ex. C, Response to Int. No. 4 (Law School's admissions system was "race neutral" and "not subject to strict scrutiny" at all because it was in compliance with the requirements of Justice Powell's opinion).

This Court should take this case to make clear that defendants' argument, although perhaps plausibly based in some of Justice Powell's more cryptic language, is wrong. Strict scrutiny applies to all racial preferences, regardless of the form those preferences take.

5. *"Compelling" Interests.* -- This Court's more recent precedents have rejected justifications, like the "role model" justification, that have no obvious temporal or other limit. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 497-98 (1989) ("because the role model theory had no relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to

'justify' race-based decisionmaking essentially limitless in scope and duration" citing *Wygant v. Jackson Bd. Of Education*, 476 U.S. 267, 276 (1986) (plurality opinion)); *Croson*, 488 U.S. at 520 (opinion of Scalia, J.). The "academic freedom" or "diversity" rationale is very much like the role model justification in that regard. It is, as the district court in *Gratz* recognized even while upholding it, "a permanent and ongoing interest." *Gratz*, 122 F. Supp. 2d at 823. *Cf. id.* ("This Court . . . is not convinced that what may be too amorphous and ill-defined in other contexts, *i.e.*, the construction industry context, is also necessarily too amorphous or ill-defined in the context of higher education").

This Court has set a high threshold for characterizing an interest as "compelling." In *Palmore v. Sidoti*, 466 U.S. 429 (1984), for example, the Court considered a Florida court's determination that a child's best interest would not be served by placing her with her white mother, who had remarried to an African American, because of the social stigma associated with a mixed marriage. The Court recognized that granting custody based on the best interests of the child was a "substantial government interest," and that there were, as the state court had recognized, certain risks associated with a child living with a stepparent of a different race. *Id.* at 433. But those additional risks were *not* sufficiently compelling to justify the consideration of race in the custody decision.

Professional school education is important, but it is just a step in an individual's development, whereas the "best interests of the child" encompasses a much broader view of that development. It is unclear why the "best interests of the students" should be a compelling interest while the "best interests of the child" is not.

Moreover, if diversity truly fosters ideas and learning, it should not be limited to colleges and universities. Government agencies might very well benefit from different perspectives in determining, for example, whether the economic benefits of allowing a power plant to be built in a poorer neighborhood outweigh the potential environmental hazards. If racial preferences are needed to obtain those different perspectives, such agencies would have the same justification as universities to adopt such preferences. To date, this Court has never yet endorsed a rationale that could be so broadly utilized to support racial preferences.

In short, this case would permit this Court to set forth standards for determining whether and when non-remedial interests are sufficiently compelling (if any are) to support race-conscious decision-making by government.

6. *Societal Discrimination.* -- It is now well-established that "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Shaw v. Hunt*, 517 U.S. 899, 910-911 (1996). Indeed, in *Wygant*, the "role model" theory was rejected at least in part because the absence of role model minority high school teachers was a consequence of societal discrimination. *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 274 (1986) (plurality opinion) (noting that the Court of Appeals had upheld a program of race-conscious layoffs to provide minority role models as a means of alleviating the effects of societal discrimination; reversing because "[t]his Court has never held that societal discrimination alone is sufficient to justify a racial classification"); *id.* at 276 (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness").

But, just as with the paucity of minority teachers in high schools, the paucity of certain racial groups from top tier state colleges and universities is no doubt also, at least in part, a product of the continuing effects of past societal discrimination. If rationales connected to societal discrimination are not compelling, then the diversity rationale cannot stand. If the connection to societal discrimination is not fatal, then further clarity is needed on which such connected justifications are compelling and which are not.

7. *The Application of* Marks *to* Bakke. -- Finally, the Ninth and Fifth Circuits have split on how to apply this Court's opinion in *Marks*, concerning the interpretation of splintered opinions of this Court, to *Bakke*. The Ninth Circuit concluded that Justice Powell's opinion was the "narrowest" because the Brennan concurrers "would have" adopted an even broader principle. The Fifth Circuit specifically rejected that analysis. *Hopwood v. Texas*, 236 F.3d at 275 n.66 ("We respectfully disagree . . . with the Ninth Circuit's . . . holding that Justice Powell's diversity rationale is binding Supreme Court precedent . . . With respect, . . . we do not read *Marks* as an invitation from the Supreme Court to read its fragmented opinions like tea leaves, attempting to divine what the Justices 'would have' held").

More generally, most courts of appeals have held that *Marks* cannot be applied unless there is a "common denominator" among the various opinions of a splintered court. *See, e.g., Ass'n Of Bituminous Coal Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 (D.C. Cir. 1998) (the "narrowest grounds" approach "does not apply unless the narrowest opinion represents a 'common denominator of the Court's reasoning' and 'embod[ies] *a position implicitly approved by at least five Justices who support the judg-*

*ment'*" (emphasis added)); *Rappa v. New Castle County*, 18 F.3d 1043, 1056-58 (3d Cir. 1994); *United States v. Castro-Vega*, 945 F.2d 496, 499 (2d Cir. 1991); *United States v. Eckford*, 910 F.2d 216, 219 n.8 (5th Cir. 1990); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 n.5 (7th Cir. 1983).

If these courts are correct, it seems unlikely that *Marks* can be applied to the academic freedom / diversity rationale in *Bakke* because the Brennan concurrers simply said nothing about that rationale and cannot be deemed to have "implicitly" endorsed it. *Hopwood v. Texas*, 236 F.3d at 275 ("None of the [Brennan concurrers] would go the extra step proposed by Justice Powell and approve student body diversity as a justification for a race-based admission criterion").[3]

On the other hand, if these courts are incorrect, then this Court can provide some guidance as to how to determine the "narrowest" opinion in cases like *Bakke*. The Brennan concurrers, after all, emphasized that the David Medical School's program limited its benefits to

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[3] Indeed, when the Brennan concurrers themselves tried to divine the "central meaning" of the splintered decisions in *Bakke*, they concluded that the common ground was on remedial uses of race. *Bakke*, 438 U.S. at 325 (Brennan, J., dissenting and concurring) ("central meaning" of opinions is that "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area"). That is, when the concurrers themselves stated the principle they gleaned from the splintered decisions in *Bakke*, they relied not upon the academic freedom or diversity principle, but rather their own remedial principle, modified by Justice Powell's additional restrictions.

individuals who were likely the victims of societal discrimination, and excluded other members of racial minority groups. In addition, they at least questioned whether a program that led to racial minorities being represented in greater proportions than their representation in the relevant state would pass muster. *See* discussion, *supra* at 15-16. This Court can clarify how one should take those considerations into account in determining whether the Powell or Brennan rationale was "narrower."[4]

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] Of course, unlike the lower courts, this Court has no obligation to consider *Marks* analysis, but can simply revisit the issues addressed in *Bakke*. *Nichols v. United States*, 511 U.S. 738, 745-46 (1994) ("We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it").

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In the United States Court of Appeals for the Ninth Circuit

KATURIA E. SMITH; ANGELA ROCK; MICHAEL PYLE; for themselves and all others similarly situated, Plaintiffs-Appellants,

v.

UNIVERSITY OF WASHINGTON, Law School; WALLACE D. LOH; SANDRA MADRID; RICHARD KUMMERT; MICHAEL TOWNSEND; ROLAND HJORTH, Defendants-Appellees,

and

ROBERT ARONSON; JOHN JUNKER; JACQUELINE MCMURTRIE; ERIC SCHNAPPER; JANET STEARNS, Defendants.

KATURIA E. SMITH; ANGELA ROCK; MICHAEL PYLE, Plaintiffs-Appellants,

v.

THE UNIVERSITY OF WASHINGTON LAW SCHOOL, Defendant-Appellee.

KATURIA E. SMITH; ANGELA ROCK; MICHAEL PYLE, Plaintiffs-Appellants,

v.

THE UNIVERSITY OF WASHINGTON LAW SCHOOL; WALLACE D. LOH; ROLAND HJORTH; SANDRA MADRID; RICHARD KUMMERT, Defendants-Appel-

lees.

No. 99-35209, No. 99-35347, No. 99-35348

Appeals from the United States District Court for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted November 14, 2000
Seattle, Washington

Filed December 4, 2000

Before: Thomas M. Reavley,[1] Ferdinand F. Fernandez, and Sidney R. Thomas, Circuit Judges. Opinion by Judge Fernandez.

Opinion by Ferdinand F. Fernandez

OPINION:

FERNANDEZ, Circuit Judge:

Katuria Smith, Angela Rock, and Michael Pyle (collectively Smith) brought this action on behalf of themselves and a class of Caucasians and others who were denied admission to the University of Washington Law School. The action was brought against the law school and

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[1] The Honorable Thomas M. Reavley, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

members of its administration and faculty[2] (collectively the Law School), and in it Smith claimed that the denials of admission had been due to racially discriminatory admissions policies, which violated 42 U.S.C. § § 1981, 1983, and 2000d. The district court decertified a class which had previously been certified under Federal Rule of Civil Procedure 23(b)(2), and did not certify a class under Federal Rule of Civil Procedure 23(b)(3).[3] The district court also denied Smith a partial summary judgment on the claim that, in general, race cannot be used as a factor in achieving educational diversity, although it may be used for certain limited remedial purposes. Smith appealed, and we affirm.

## BACKGROUND

On July 1, 1997, Smith filed suit against the Law School alleging illegal discrimination against Caucasians and others on the basis of their race, which resulted in their being denied admission to the law school. From at least 1994 to December of 1998, the Law School did use race as a criterion in its admissions process so that it could assure the enrollment of a diverse student body. There is no dispute about that. Katuria Smith was denied admission in 1994, but she attended another law school and obtained

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[2] The individuals are Wallace D. Loh, Dean of the Law School (1990-1995), Roland J. Hjorth, Dean of the Law School (1995), Sandra Madrid, Assistant Dean of the Law School, and Richard Kummert, Faculty Member and Chair of the Admissions Committee of the Law School.

[3] Hereafter we will simply refer to Federal Rule of Civil Procedure 23 as Rule 23.

her law degree there. Angela Rock was denied admission in 1995. She, too, attended another law school and obtained her law degree. Michael Pyle was denied admission in 1996, but when he reapplied in 1999 he was admitted. By that time, the overt racial policy had been terminated.

On April 22, 1998, the district court certified a Rule 23(b)(2) class for injunctive and declaratory relief only.[4] The court did not certify a class with respect to damages at that time.[5] The case proceeded, but so did time and events in the world outside of the courtroom. On November 3, 1998, the people of the State of Washington passed Initiative Measure 200, which enacted the following provision among others: "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[6]

The Law School then moved to dismiss the individual and class actions, on the basis that the claims were moot as the result of the passage of I-200 because it prohibits the Law School from discriminating in the manner that

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[4] The certified class consisted of all Caucasian applicants who were denied admission to the law school commencing in 1994.

[5] The district court entered an order on February 22, 1999, clarifying its April 22, 1998, order "to hold that for the reasons stated in that Order certification of the plaintiffs' claims for damages would not be appropriate under Rule 23(b)(3)."

[6] The measure is now codified at Wash. Rev. Code § 49.60.-400(1). It will hereafter be referred to as I-200.

Smith complained of. Smith opposed the motion to dismiss and argued that the claims were not moot because of the uncertainty of how the Law School would actually interpret and apply I-200, but the Law School pointed out that, pursuant to a directive from the president of the University of Washington, it had eliminated the use of race as a criterion in its admission process. The new admission policy did retain a diversity clause, which stated that "important academic objectives are furthered by . . . students . . . from diverse backgrounds" and then went on to set out a nonexhaustive list of factors as indicative of diversity including "persevering or personal adversity or other social hardships; having lived in a foreign country or spoken a language other than English at home; career goals . . .; employment history; educational background . . .; evidence of and potential for leadership . . .; special talents . . .; geographic diversity or unique life experiences." Race itself, along with color and national origin, were excluded from the list. On February 10, 1999, the district court issued an order granting the motion to dismiss the individual and class claims for injunctive and declaratory relief as moot due to the passage of I-200, and decertifying the Rule 23(b)(2) class.

On February 12, 1999, the district court issued another order in which it denied Smith's motion for partial summary judgment. However, on February 22, 1999, it also made the necessary findings under 28 U.S.C. § 1292-(b) and went on to designate "two controlling questions of law as to which there is substantial ground for difference of opinion: (1) whether educational diversity is a compelling governmental interest that meets the requirement of 'strict scrutiny' for race-conscious measures under the Fourteenth Amendment to the United States Constitution;

and (2) whether race may be considered only for remedial purposes." Smith then sought to appeal both the order of February 10, 1999, and the order of February 12, 1999. We granted the applications.

## JURISDICTION AND STANDARDS OF REVIEW

Pursuant to Rule 23(f) and our order which granted permission to appeal, we have jurisdiction over Smith's appeal from the order decertifying the Rule 23(b)(2) class. Pursuant to 28 U.S.C. § 1292(b) and our order which granted permission to appeal, we have jurisdiction over Smith's appeal from the order denying partial summary judgment.

"We review a district court's determination of mootness de novo." *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 811 (9th Cir. 1997). However, we review a district court's determination regarding class certification, including denial of certification, for an abuse of discretion. *See id.* at 816; *Barber v. Hawaii*, 42 F.3d 1185, 1197 (9th Cir. 1994); *Montgomery v. Rumsfeld*, 572 F.2d 250, 255 (9th Cir. 1978). In order for a party to be entitled to summary judgment, he must show not only that there are no questions of material fact, but also that he is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Western Chance No. 2, Inc. v. KFC Corp.*, 957 F.2d 1538, 1540 (9th Cir. 1992). Those are matters that we review de novo. *See Western Chance*, 957 F.2d at 1540.

## DISCUSSION

Smith asks us to reverse the district court on three bases. First, the district court's determination that the Rule 23(b)(2) class for prospective relief should be decertified is attacked. Similarly, Smith attacks the district court's failure to certify a Rule 23(b)(3) damages class action. Finally, Smith asserts that the district court improperly failed to grant a partial summary judgment because it should have determined that the Law School was prohibited from using a race-conscious admissions policy under the circumstances. We will discuss the first and the last of these issues on the merits, but reject the second because it is not properly before us.

### A. *Class Certification; Mootness*

Smith first attacks the district court's determination that once I-200 was passed and its force was recognized by the Law School, there was no reason to rule on the claims for declaratory and injunctive relief. We agree with the district court. That is, regardless of what the Law School might have thought that the United States Constitution allowed, after initiative measure I-200 was passed state law directed that "in the operation of . . . public education" the state was prohibited from discriminating or offering preferential treatment to "any individual or group on the basis of race, sex, color, ethnicity, or national origin." That, as the district court indicated, made it unnecessary to enjoin the Law School from operating a preferential program, and made it equally unnecessary to declare that it could not do so. Moreover, there was no need to continue with a class action for that purpose. In a

word, that part of the controversy had become moot.

Mootness is, of course, simply one facet of justiciability. *See Flast v. Cohen*, 392 U.S. 83, 95, 88 S. Ct. 1942, 1950, 20 L. Ed. 2d 947 (1968). Mootness is like standing, in that if it turns out that resolution of the issue presented cannot really affect the plaintiff's rights, there is, generally speaking, no case or controversy for the courts to adjudicate; no real relief can be awarded. As has sometimes been said: "Mootness is 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1509 (9th Cir. 1994) (citation omitted). In this case, the district court did find standing in the first place, but, again, it properly determined that it could give no relief of a prospective nature once the statute and its aftermath had accomplished all that a judgment could accomplish. As sometimes happens, time and events, including the movement of societal opinion, outstripped the court processes.

That is the short answer, but that alone will not do because this is an area rife with exceptions, qualifications, even quibbles. So we must go on. It is true, as Smith points out, that the Supreme Court has opined that when a party asserts that a case has become moot, "the burden of demonstrating mootness 'is a heavy one.'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383, 59 L. Ed. 2d 642 (1979). That does not mean that the burden cannot be borne, and it was in the just quoted case. *See id.*

It is fair to say, nonetheless, that courts are particularly cautious when a case has become moot because the defendant has voluntarily ceased to pursue the challenged course of action. Were it otherwise, the defendant's "mere voluntary cessation" would compel the courts to "leave 'the defendant . . . free to return to his old ways.'" *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203, 89 S. Ct. 361, 364, 21 L. Ed. 2d 344 (1968) (citation omitted). Of course, that would be intolerable. But even when a cessation is voluntary, mootness can follow. Even then, the record may show that "(1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631, 99 S. Ct. at 1383 (citations omitted); *see also Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998).

We, too, have recognized that the voluntariness of the cessation is a factor, rather than a clincher. As we explained in *Armster v. United States Dist. Ct.*, 806 F.2d 1347, 1358 n.16 (9th Cir. 1987), "it appears that the voluntariness of the cessation is relevant to the issue of the likelihood of recurrence." And in a case where Congress had changed the statutory scheme, we reflected on the fact that "ordinarily, voluntary cessation of challenged activity will not render a claim moot." *Martinez v. Wilson*, 32 F.3d 1415, 1420 (9th Cir. 1994). Yet, we said, there was "'no reasonable expectation' that the challenged practices - if invalid - will be reinstated." *Id.* (citation omitted). Thus, we found that the plaintiff's injunction request was moot. *Id.* Finally, in *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000), we upheld the district court's denial of declar-

atory and injunctive relief because it was clear that the agency's voluntary change in position was "a permanent change" in the way it did business and was not "a temporary policy that the agency will refute once this litigation has concluded." Thus, we said, the claim for prospective relief was moot. *Id.* at 1244.

We are satisfied that when these approaches are applied to this case, even if the Law School's change of policy has some tinge of voluntary cessation, as Smith contends, the matter is still moot. The only truly voluntary aspect is that the Law School did stop using race, ethnicity, and national origin as factors once I-200 was passed and the directive from the president of the University was issued. The Law School did not wait for litigation or internal University discipline before doing that. To the extent that can be called voluntary, it is still highly unlikely that the Law School's old practices will be recrudescent under the current state of the law in Washington.

Moreover, considering the real reason for the change, it is rather apparent that it was made under the lash of I-200 and not because of the prodding effect of this litigation. That tends to indicate that the change was not really voluntary at all. *See Sze v. INS*, 153 F.3d 1005, 1008 (9th Cir. 1998); *Pub. Utils. Comm'n v. Fed. Energy Regulatory Comm'n*, 100 F.3d 1451, 1460 (9th Cir. 1996); *Noatak*, 38 F.3d at 1511; *see also Texas v. Hopwood*, 518 U.S. 1033, 1034, 116 S. Ct. 2581, 2582, 135 L. Ed. 2d 1095 (1996) (Ginsburg, J., joined by Souter, J.) (certiorari properly denied because old race-based program was discontinued and would not be reinstated). In fact, it is generally fair to say that when a change of position is wrought by a statutory provision, the change is neither

voluntary nor likely to be resiled from at any time in the foreseeable future.

As we declared in *Noatak*, 38 F.3d at 1510, "[a] statutory change . . . is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed. As a general rule, if a challenged law is repealed or expires, the case becomes moot." Smith argues that *Noatak* can be distinguished because it involved the repeal of a statute that was being challenged. Smith is correct, but that is a distinction without a difference. As other courts have said, the real point is that a new statutory enactment has removed the basis or need for relief. *See Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 990 (9th Cir. 2000); *Defenders of Wildlife, Inc. v. Endangered Species Scientific Auth.*, 233 U.S. App. D.C. 199, 725 F.2d 726, 732 (D.C. Cir. 1984); *New Mexico ex rel. New Mexico State Highway Dep't. v. Goldschmidt*, 629 F.2d 665, 667-68 (10th Cir. 1980). That is what has occurred here.

There can be no real expectation that the alleged wrongs will recur now that the people of the state have prohibited them. Nor can we address Smith's fear of "the *possibility* that the state's allegedly discriminatory policy will manifest itself under the new statute. Federal courts are not authorized to address such theoretical possibilities." *Noatak*, 38 F.3d at 1510. And, surely, this is not the kind of wrong that is so limited in duration that it would always escape review. *Id.* If the Law School should become temerarious enough to decide to ignore the law of the State of Washington in the future, Smith, or others, can commence a new battle at that time.

But, says Smith, the Law School insisted, and still insists, that its race-conscious selection program was perfectly legal before the people of the State of Washington declared otherwise. Assuming that is so, it does not suggest that the Law School is ready to violate state law. It has not done so as far as this record shows, and we will not assume that it will. Similarly, we will not assume that it will act in bad faith. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19, 98 S. Ct. 2733, 2763, 57 L. Ed. 2d 750 (1978); *cf. United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 856-57 (9th Cir. 1995) (where defendant had violated regulations and introduced reforms under protest, its "past illegal conduct [gave] rise to an inference that future violations may occur"); *Gluth v. Kangas*, 951 F.2d 1504, 1507 (9th Cir. 1991) (past arbitrary actions and vague new policies suggest reoccurrence). Rather, the fact, if it is a fact, that the Law School bridles at the harness placed upon it by the people of the state may go to show that its actions are not voluntary, but it does not go to show that the Law School will break that harness.

In short, the request for prospective relief is moot. In so stating, we have not overlooked Smith's assertion that declaratory relief is sometimes proper, even when injunctive relief is not. We recognize that in principle. *See Steffel v. Thompson*, 415 U.S. 452, 468-69, 94 S. Ct. 1209, 1220-21, 39 L. Ed. 2d 505 (1974); *Zwickler v. Koota*, 389 U.S. 241, 254, 88 S. Ct. 391, 399, 19 L. Ed. 2d 444 (1967); *Olagues v. Russoniello*, 770 F.2d 791, 803 (9th Cir. 1985). That, however, does not serve to resurrect the claim in question here. Declaratory relief claims are not immune from mootness considerations. *See Kasza v. Browner*, 133 F.3d 1159, 1172 (9th Cir. 1998); *Enrico's Inc. v. Rice*, 730 F.2d 1250, 1254-55 (9th Cir.

1984). And here there is no more reason to maintain a prospective declaratory relief class action to pass on the now abandoned policy than there is to issue an injunction against that policy. The one claim is as moot as the other.

Thus, the district court properly decertified the Rule 23(b)(2) class action, which had been certified in the first place for declaratory and injunctive relief only. That, then, leads to Smith's claim that there should have been a damages class action also. *See* Rule 23(b)(3).

B. *Class Certification; Damages*

The district court did not certify a damages class action under Rule 23(b)(3) at the time that it first certified the injunctive and declaratory relief class action on April 22, 1998. At that time, Smith did not have a right to seek an immediate appeal in this court because the special appeal procedure was not yet effective. *See* Rule 23(f) (effective December 1, 1998). No other certification of issues for appeal was then requested or obtained. In that respect, it should be noted that Smith had not actually asked for both a Rule 23(b)(2) and a Rule 23(b)(3) class certification, but had, instead, listed the latter as an alternative to the former. In this circuit, at least, the provisions are not mutually exclusive. *See Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 622 (9th Cir. 1982); *see also Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999). *Contra DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995).

At any rate, when the district court decertified the

Rule 23(b)(2) class on February 10, 1999, the new procedure was in place and an immediate appeal could be, and was, applied for. However, the Rule 23(b)(3) issue was not part of the order of February 10, 1999, and is not properly before us at this time. Nor will it do to argue, as Smith does, that we can consider the whole of the district court's order, and reverse for any appropriate reason. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1365 (11th Cir. 1997); *Bernard v. Air Line Pilots Ass'n Int'l*, 873 F.2d 213, 215 (9th Cir. 1989). When we consider the whole of the order in question, we still find no references to any possible Rule 23(b)(3) certification,[7] and that is not surprising because the issue was not then placed before the district court. The closest the district court came to even addressing damages was its reflection that the old Rule 23(b)(2) class action could not continue on the theory that some incidental damages might be appropriate. Not only had the district court refused to include damages in the initial certification, but also damages would hardly be incidental when the prospective relief portion of the action had become moot. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411-18 (5th Cir. 1998); *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986).

Therefore, the district court's order which refused to certify a Rule 23(b)(3) class is not properly before us, and we will not consider it.

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[7] We recognize that on February 22, 1999, the district court clarified its April 22, 1998, order by indicating that although it had not expressly addressed the alternative motion to certify a Rule 23(b)(3) class in the earlier order it did not believe that damage claims would be an appropriate part of a class action in this case. But no appeal was sought from the February 22, 1999, order.

C. *Denial of Partial Summary Judgment*

The district court denied Smith's partial summary judgment motion because it decided that under Supreme Court precedent race could be used as a factor in educational admissions decisions, even where that was not done for remedial purposes. That, in effect, encompasses the questions that the district court thought warranted a 28 U.S.C. § 1292(b) order, and the questions that we accepted for decision.

There can be no doubt that the district court's decision faithfully followed Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In that opinion, Justice Powell, while announcing the opinion of the Court, held that the race-based quota system used by the Medical School at the University of California at Davis violated both Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d - 2000d-4, and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 269-72, 98 S. Ct. at 2737-38. In arriving at that conclusion, Justice Powell laid down certain principles.

First,[8] strict scrutiny will be applied to "a classification based on race and ethnic background." *Id.* at 289, 98 S. Ct. at 2747. Simply put, that is because "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at

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[8] We will hereafter refer to these and the other principles we outline as the First principle, the Second principle, etc.

291, 98 S. Ct. at 2748. Thus, when the state chooses to use race in its decision making process, an affected individual "is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.* at 299, 98 S. Ct. at 2753.

Second, if the purpose of an educational institution "is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid." *Id.* at 307, 98 S. Ct. at 2757. Pure (or, if you will, impure) percentages used for their own sake are not proper.

Third, "the State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." *Id.* However, that will not justify a racial classification "in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Id.* And, "isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria." *Id.* at 309, 98 S. Ct. at 2758. As a result, when the purpose of the classification is simply to help "certain groups . . . perceived as victims of 'societal discrimination' [that] does not justify a classification that imposes disadvantages upon persons . . .,who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Id.* at 310, 98 S. Ct. at 2758.

Fourth, the attainment of a diverse student body "is a constitutionally permissible goal for an institution of higher education." *Id.* at 311-12, 98 S. Ct. at 2759. In that regard, "ethnic diversity" can be "one element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body." *Id.* at 314, 98 S. Ct. at 2760-61. In an admissions program dedicated to achieving a mixed student body a university may, therefore, deem race or ethnic background to be "a 'plus' in a particular applicant's file, [when] it does not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317, 98 S. Ct. at 2762. In other words, race can be a factor in determining a particular candidate's "potential contribution to diversity without the factor of race being decisive" when compared to the qualities exhibited by others. *Id.* So, for example, a list of factors could include, in addition to race, such qualities as "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, [or] ability to communicate with the poor." *Id.* So, when all is said and done, even if race is a consideration, each applicant is, in fact, treated as an individual rather than as a mere stand-in for some favorite group. *See id.* at 318, 98 S. Ct. at 2762. The effect, then, is that each person's qualifications will have been weighed fairly, and a losing candidate will not have a basis "to complain of unequal treatment under the Fourteenth Amendment," because, even if the last available seat has been given to a person who received "a 'plus' on the basis of ethnic background," the loser "will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname." *Id.*

The Law School does not assert that its program came within the Third principle, but it does say that it came within the Fourth one. The district court agreed that if the Law School did come within the Fourth principle, Smith was not entitled to a partial summary judgment. That, as we have said, is a correct reading of Justice Powell's opinion. The difficulty with which we are presented is that in *Bakke* none of the other Justices fully agreed with Justice Powell's opinion, so we are left with the task of deciding just what the Supreme Court decided.

In a separate opinion, Justice Stevens, who was joined by Chief Justice Burger and Justices Stewart and Rehnquist, agreed only that the program under review violated Title VI when it excluded "Bakke from the Medical School because of his race." *Id.* at 421, 98 S. Ct. at 2815. Thus, there was no need to address the broader constitutional issues. Whatever the Constitution might demand, they said, Title VI "has independent force, with language and emphasis in addition to that found in the Constitution," and it prohibited the program in question. *Id.* at 416, 98 S. Ct. at 2812. As a result, the Fourth principle could not save the program from violating Title VI and the Third principle would not do so either.

Justice Brennan authored still another opinion in which he was joined by Justices White, Marshall and Blackmun. They would have upheld the program in question, quota system though it was. In their view, Title VI "does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment." *Id.* at 328, 98 S. Ct. at 2768. That, then, brought them to considering what the Fourteenth Amend-

ment required.

In the first place, they expressed discomfort with the idea that strict scrutiny of this kind of racial classification (that is, one that advantages others over Caucasians) should be required when the classification did not tend to stigmatize a less favored group. *See id.* at 356-58, 98 S. Ct. at 2781-82. Still, they recognized that the "'mere recitation of a benign, compensatory purpose'" should not be enough where race is concerned. *Id.* at 358-59, 98 S. Ct. at 2782-83 (citation omitted). In their view, "to justify such a classification an important and articulated purpose for its use must be shown," and as a result "review under the Fourteenth Amendment should be strict - not 'strict' in theory and fatal in fact, because it is stigma that causes fatality - but strict and searching nonetheless." *Id.* at 361-62, 98 S. Ct. at 2784 (internal quotations omitted). Thus, they would seemingly apply somewhat less strict scrutiny, although it is clear that Justice Powell did not mean strict in theory while fatal in fact when he articulated the First principle.

Justice Brennan, and the others, however, did not agree with Justice Powell's limitation of the Third principle to those instances where institutional discrimination was shown, or legislative, etc., findings were made. Rather, they would permit a program whose "articulated purpose [was] remedying the effects of past societal discrimination." *Id.* at 362, 98 S. Ct. at 2784. In other words, they would allow individual institutions, and programs, like the Davis Medical School to give "preferential treatment for those likely disadvantaged by societal racial discrimination." *Id.* at 366, 98 S. Ct. at 2787. They, therefore, approved of "race-conscious programs" for the

purpose of remedying the "disparate racial impact" that an admissions policy might otherwise have "if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large." *Id.* at 369, 98 S. Ct. at 2788.

In fine, the Justices who concurred in Justice Brennan's opinion would have established a principle broader than the Third principle because they would have allowed individual institutions or departments to ameliorate societal discrimination, even without specific judicial, legislative or administrative findings at the proper level. That being so, they would have upheld the program in question. Thus, they would have accepted an even more expansive use of racial factors than that permitted in Justice Powell's opinion.

That leaves the Fourth principle. It is interesting to note that Justice Brennan's opinion does not really disagree with the Fourth principle's statement that race can be used as a plus factor, even if there were no past societal discrimination shown, as such. Really, his opinion did not need to do so because he saw societal discrimination as a given, and would, perhaps, allow much more than a simple plus to be assigned to it. Nevertheless, he and the Justices who joined him were of the opinion that their approach did not grant seats in the university based solely on race, but only to "minority applicants likely to have been isolated from the mainstream of American life . . .; other minority applicants are eligible only through the regular admissions program." *Id.* at 377, 98 S. Ct. at 2792. And, they asserted, their approach also gave applicants "individualized consideration." *Id.* at 378 n.63, 98 S. Ct. at 2793 n.63. Finally, they saw no real difference

between a "plus" program and one that used a kind of quota, except that the former might be "more acceptable to the public." *Id.* at 379, 98 S. Ct. at 2793.

Therefore, it appears that those Justices would simply give more weight to the race factor than would the Fourth principle, but they, it seems clear, would not have eschewed the use of a plus factor in a program that also looked to other considerations. Indeed, they saw nothing unconstitutional about a diversity based program that at least purported to take all kinds of special characteristics and talents, including race, into account, and they opined that a program of that sort is certainly constitutional. *See id.* In other words, they agreed with the Fourth principle's conclusion that a program of that type was constitutional.

But what is one to make of that fragmented decision of the Supreme Court; what guidance or principles did it convey to an anxious nation, and to even more anxious educators? Perhaps it is a sign of our fractious times that the Supreme Court has had to provide us with a template for reading its fractured opinions. It has declared that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977) (citation omitted); *see also Harris v. Wright*, 93 F.3d 581, 584 (9th Cir. 1996); *United States v. Puerta*, 982 F.2d 1297, 1304 (9th Cir. 1992).

*Bakke* presents a special problem because Justice

Brennan's opinion disagreed with Justice Powell's opinion that the Davis Medical School program, as it then stood, had to be overturned on constitutional grounds. The overturning of that program, thus, actually required the vote of Justice Powell plus the votes of those who joined in Justice Stevens' opinion. The latter, however, so voted on the broad basis that Title VI precluded all race-conscious admission policies. Thus, Justice Powell's opinion was certainly more narrow than theirs in that respect. Still, it was clear that a majority of the Court did not take the view reflected in Justice Stevens' opinion. A majority would have allowed for some race-based considerations in educational institutions, both under Title VI and under the Fourteenth Amendment. Thus, a race-based possibility must be taken to be the actual rationale adopted by the Court. Certainly, Justice Powell's opinion has often been cited approvingly in that regard. *See, e.g., Metro Broad., Inc. v. FCC*, 497 U.S. 547, 568, 110 S. Ct. 2997, 3010, 111 L. Ed. 2d 445 (1990), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995); *Johnson v. Transp. Agency*, 480 U.S. 616, 637-38, 107 S. Ct. 1442, 1455, 94 L. Ed. 2d 615 (1987); *Higgins v. City of Vallejo*, 823 F.2d 351, 358 (9th Cir. 1987); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285-86, 106 S. Ct. 1842, 1853, 90 L. Ed. 2d 260 (1986) (O'Connor, J., concurring). We must, therefore, apply the *Marks* analysis to the opinions of Justices Powell and Brennan.

When we do, it becomes apparent that Justice Powell's analysis is the narrowest footing upon which a race-conscious decision making process could stand. If educational institutions can sometimes use race in their admission alchemy, virtually every point in Justice Bren-

nan's opinion would establish broader grounds for allowing that. The standard of scrutiny set forth in the First principle would become, if anything, less demanding. The Third principle would be vastly expanded to allow any unit of any institution to take account of societal discrimination. Finally, race would, at the very least, become a much more weighty factor in the Fourth principle, and even come close to being a trump where some disadvantage to a member of a favored group was shown. True it is that Justice Brennan did not specifically say that "race" could be used to achieve student body diversity in the absence of any societal discrimination, but, then, there was no need for him to do so in light of his view about past societal discrimination. Yet, we can hardly doubt that he would have embraced that somewhat narrower principle if need be, for he thought that it was simply an allotrope of the principle he was propounding. If the various opinions in *Bakke* mixed so many different colors that the result became rather muddy, that result was still clear enough to permit educators to rely upon the opinion that gave the decision its life and meaning - the opinion that avoided both polar possibilities. More importantly, we are required so to do.

We are well aware of the fact that much has happened since *Bakke* was handed down. Since that time, the Court has not looked upon race-based factors with much favor. *See, e.g., Adarand*, 515 U.S. at 227, 115 S. Ct. at 2112-13; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S. Ct. 706, 721, 102 L. Ed. 2d 854 (1989). Still, it has not returned to the area of university admissions, and has not indicated that Justice Powell's approach has lost its vitality in that unique niche of our society. As we see it, regardless of what we think the Supreme Court

might do, we must let it decide. It has admonished that "other courts [should not] conclude [that] our more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 2017, 138 L. Ed. 2d 391 (1997). On the contrary, it has said, "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917, 1921-22, 104 L. Ed. 2d 526 (1989).

We, therefore, leave it to the Supreme Court to declare that the *Bakke* rationale regarding university admissions policies has become moribund, if it has. We will not.[9] For now, therefore, it ineluctably follows that the Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.

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[9] We acknowledge that *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), decided to the contrary. The flaws in that decision, however, stem from its failure to properly apply the teachings of *Marks*, 430 U.S. at 193, 97 S. Ct. at 993, and *Agostini*, 521 U.S. at 237, 117 S. Ct. at 2017. *See Lesage v. Texas*, 158 F.3d 213, 223 (5th Cir. 1998) (Reavley, J. concurring), *reversed on other grounds*, 528 U.S. 18, 120 S. Ct. 467, 145 L. Ed. 2d 347 (1999); *Hopwood v. Texas*, 84 F.3d 720, 723 (5th Cir. 1996) (Politz, C.J., dissenting from failure to grant rehearing en banc).

## CONCLUSION

The district court correctly decided that Justice Powell's opinion in *Bakke* described the law and would require a determination that a properly designed and operated race-conscious admissions program at the law school of the University of Washington would not be in violation of Title VI or the Fourteenth Amendment. It was also correct when it determined that *Bakke* has not been overruled by the Supreme Court. Thus, at our level of the judicial system Justice Powell's opinion remains the law.

However, the Law School has encountered a peripeteia in its own state; it is bound by I-200, which precludes it from granting "preferential treatment" to any individual "on the basis of race." That has rendered Smith's request for prospective relief moot because we "[should] not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith [should] be presumed in the absence of a showing to the contrary . . . ." *Bakke*, 438 U.S. at 318-19, 98 S. Ct. at 2763.

AFFIRMED.

The Honorable Thomas S. Zilly

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

KATURIA E. SMITH, ANGELA ROCK,
and MICHAEL PYLE,

for themselves and all others
similarly situated,

Plaintiffs,

V. Civil Action # C-97-335

THE UNIVERSITY OF WASHINGTON
LAW SCHOOL, et al.,

Defendants. **[Filed and Entered on**
**February 22, 1999 W.D.Wa]**
**PROPOSED ORDER**

On February 12, 1999, this Court denied plaintiffs' motion for partial summary judgment. This Court concludes that that Order involved two controlling question of

law as to which there is substantial ground for difference of opinion: (1) whether educational diversity is a compelling governmental interest that meets the requirement of "strict scrutiny" for race-conscious measures under the Fourteenth Amendment to the United States Constitution; and (2) whether race may be considered only for remedial purposes. This Court also concludes that an immediate appeal of that Order may materially advance the ultimate termination of the litigation. Accordingly, this Court modifies the February 12 Order by certifying it pursuant to 28 U.S.C. § 1292(b).

The Case is hereby stayed pending further order of the Court.

Presented By

/s/

Michael Madden

Dated this 22nd day of February, 1999

/s/

United States District Judge

/s/

Michael E. Rosman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KATURIA E. SMITH, et al.,

Plaintiffs,

V. NO. C97-335Z

THE UNIVERSITY OF WASHINGTON LAW SCHOOL, et al.,

Defendants. **[Filed and Entered on February 12, 1999 W.D.Wa]**

***ORDER***

This matter comes before the Court on the plaintiffs' motion for partial summary judgment (docket no. 217), and defendants' motion for summary judgment on all claims (docket no. 193). The court, having considered the motions, and all papers filed in support of and in opposition to the motions, hereby DENIES the plaintiffs' motion for partial summary judgment and the defendants' motion for summary judgment.

I. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs move for partial summary judgment on the issue of whether defendants sued in their official capacity violated the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1981,[1] and whether the Law School violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq. Plaintiffs motion is premised on defendants' admission that they considered race in their admissions decisions for the purpose of achieving educational diversity. Plaintiffs argue that educational diversity is not a compelling state interest that would justify a race-conscious admissions program.

The thrust of plaintiffs' argument is that Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 316-19, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), which viewed achievement of "educational diversity" as a compelling state interest, was not the holding of the Court in Bakke, and should not be considered the law of the case. This argument was accepted by the Fifth Circuit in Hopwood V. Texas, 78 F.3d 932, 944 (5th Cir.), cert. denied, 518 U.S. 1033, 116 S.Ct. 2581, 135 L.Ed.2d 1095 (1996), which noted that

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[1] Consistent with the Eleventh Amendment, claims against the defendants sued in their official capacity, as opposed to their personal capacity, are limited to prospective claims for declaratory and injunctive relief. By separate Order entered February 10, 1999, the Court dismissed all individual and class claims for injunctive and declaratory relief, with the exception of plaintiff Pyle's claim for an injunction ordering that he be admitted to the Law School. Although the plaintiffs specified that they seek summary judgment against the official capacity defendants, the Court will proceed with this motion because plaintiffs have also asked for partial summary judgment on the Title VI claims against the Law School and because the issues raised in the motion are relevant to other claims.

"Justice Powell's argument in Bakke garnered only his own vote and has never represented the view of the majority of the Court in Bakke or any other case." Plaintiffs argue in the alternative that subsequent Supreme Court authority makes clear that the educational diversity interest will not satisfy strict scrutiny, and that race may be considered only to remedy the present effects of past discrimination by the institution in question.

A. Bakke as Precedent

In Bakke, the Supreme Court considered whether the University of California at Davis Medical School's admissions policy, which had reserved sixteen of 100 seats in the entering class for disadvantaged members of minority races, violated the Equal Protection Clause of the Fourteenth Amendment and Title VI. Although unable to agree on an opinion as to the major issues, five justices agreed that the California Supreme Court's judgment must be affirmed insofar as it held that the medical school's special admissions program was unlawful and that plaintiff must be admitted. A different five-member majority agreed that the California Supreme Court's judgment must be reversed insofar as it prohibited the defendant from according any consideration to race in its future admissions process.

Justice Stevens and three concurring justices (the Stevens group) concluded that under Title VI race cannot be the basis for excluding anyone from participation in a federally funded program, and therefore the University's special admissions program violated Title VI by excluding Bakke because of his race. The Stevens group did not reach the constitutional question of whether the program

violated the Equal Protection Clause because the case could be decided on statutory grounds (Title VI).

Justice Brennan and three concurring justices (the Brennan group) concluded that the admissions program would be legal under both Title VI and the Equal Protection Clause. The Brennan Group, applying an intermediate standard of review, concluded that UC Davis's goal of admitting minority students disadvantaged by the effects of past discrimination was sufficiently important to justify the use of race-conscious admissions criteria.

Justice Powell, writing for himself, held that racial and ethic distinctions of any sort are inherently suspect and thus call for a strict scrutiny review. Applying this standard, Justice Powell found that attainment of a diverse student body was a constitutionally permissible goal for an institution of higher learning; however, that state interest was not served by a two-track system with a prescribed number of seats set aside for an identifiable category of applicants. Rather, he endorsed a "Harvard-type" plan, which viewed racial and ethnic diversity as only one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous student body. Because the University of California at Davis used race as the sole diversity factor, its admissions program could not withstand constitutional scrutiny. Powell's opinion was limited to the question of whether the admissions policy was constitutional. He did not specifically address the legality of the program under Title VI because he concluded that Title VI proscribed only those racial classifications that would violate the Equal Protection Clause.

In Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), the Supreme Court instructed that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment on the narrowest grounds. . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). The application of the Marks principle to the Bakke decision is particularly vexing because in many ways the opinions of the Justices are at odds with each other. Nevertheless, the Court concludes that Justice Powell's opinion represents the narrowest grounds for the Court's judgment under the Marks analysis, and therefore should be considered the holding of the Court.

Some courts have assumed that Marks requires the lower courts to find a common denominator among the various opinions that would garner the approval of at least five Justices. See, e.g., Rappa v. New Castle County, 18 F.3d 1043, 1057 (3rd Cir. 1994) (quoting Planned Parenthood v. Southeastern Pa. v. Casey, 947 F.2d 693 (3rd Cir. 1991), aff'd in part and rev'd in part, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)); King v. Palmer, 950 F.2d 771,781 (D.C. Cir. 1991), cert. denied, 505 U.S. 1229, 112 S.Ct. 3054, 120 L.Ed.2d 920 (1992). This Court concludes that Marks would be unworkable if it were interpreted in such a manner.[2] Rather, Marks

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[2] Plaintiffs also cite lower court cases that have held that where there is no common denominator Marks is inapplicable and the Supreme Court case is given no precedential value. See, e.g., Ass'n of

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requires a more simplistic analysis. The Court should look to which of the opinions concurred in the judgment on the narrowest grounds without regard to whether that position would be accepted by at least five of the other Justices.[3]

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Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998); Rappa, 18 F.3d at 1058. But the Supreme Court has often repeated that the precedential value of cases must be determined in accordance with Marks. The plaintiffs cite Baldasar v. Illinois, 446 U.S. 222 (1980), as example of a Supreme Court case that cannot be deciphered using the Marks analysis, but the Supreme Court has suggested that Marks still provides the key to uncovering the meaning of such fragmented opinions. In a subsequent opinion, the Supreme Court, addressing the confusion of the lower courts as to Baldasar's meaning, reiterated the Marks rule, but noted that rather than "pursue the Marks inquiry to the utmost logical possibility when it has baffled and divided the lower courts that have considered it," the Court would reexamine the issues in Baldasar anew. See Nichols v. United States, 511 U.S. 738, 746, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). This suggests that the Supreme Court expects that the precedential value of any case can be determined by applying the Marks rule.

[3] See Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764-65, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988), in which a majority of the Supreme Court viewed the plurality opinion of Justice Reed (joined by two other Justices) in Kovacs v. Cooper, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948), as the law of the case, and rejected the dissent's argument that Kovacs was not good law because it "was not the Court's view at all, but rather, an opinion for a three-Justice plurality" see id. at 785 (dissenting opinion). The majority explained:

> The dissent suggests that the Kovacs plurality distinction of Saia is somewhat not good law because four other Justices (three of whom were in dissent) adopted the far broader rationale that Saia was actually repudiated. Justice White's interpretation of Kovacs does not square with our settled jurisprudence: when no single rationale commands a majori-

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Plaintiffs argue that to the extent any one rationale in Bakke can be viewed as the narrowest, it is Justice Brennan's. In almost every way, however, Justice Powell's opinion in Bakke is narrower than the Brennan group's opinion. First, the Brennan group would apply only an intermediate standard of review to race-conscious admissions programs, whereas Justice Powell would require strict scrutiny. Second, the Brennan group would find that remedying past ***societal*** discrimination is a sufficient justification for race-based programs, whereas Justice Powell concludes that the interest in remedying past societal discrimination is too broad and amorphous and "would convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination." Bakke, 438 U.S. at 310 (Powell, J.). Thus, the Brennan group rationale would subject race-based admissions programs to less scrutiny and would result in a broader range of race-conscious admissions programs being upheld as constitutional.

The opinion of Justice Powell, which calls for strict scrutiny of racial classifications and permits race to be

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> ty, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgmen[t] on the narrowest grounds. [citing Marks] Clearly, in Kovacs the plurality opinion put forth the narrowest rationale for the Court's judgment.

Id. at 764 n.9. Thus, the Court has made clear that the opinion that sets forth the narrowest rationale for the Court's judgment is the holding of the Court regardless of whether that position would garner approval of at least five Justices.

used in university admissions only to achieve educational diversity, is narrower in scope and application than the Brennan opinion. Thus, under Marks it should be viewed as the holding of the Court.

This Court's decision to follow Bakke is consistent with the way Bakke has been viewed by almost every court except Hopwood. The Ninth Circuit has written approvingly and applied Justice Powell's Bakke rationale in Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987), and several other courts have treated Justice Powell's opinion as the holding of the Court. See, e.g., McDonald v. Hogness, 92 Wash. 2d 431, 439-40, 598 P.2d 707 (1979), cert. denied, 445 U.S. 962, 100 S.Ct. 1650, 64 L.Ed.2d 238 (1980); DeRonde v. Regents of the Univ. of Cal., 28 Cal.3d 875, 172 Cal. Rptr. 677, 625 P.2d 220 (1981), cert. denied, 454 U.S. 832, 102 S.Ct. 130, 70 L.Ed.2d 110 (1981); University & Community College Sys. Of Nevada v. Farmer, 113 Nev. 90, 930 P.2d 730 (1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1186, 140 L.Ed.2d 317 (1998). Finally, members of the Supreme Court have continued to refer to Justice Powell's Bakke opinion in subsequent affirmative action cases, see Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 218, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), and City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-497, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), and at least one Justice has suggested that the issue of educational diversity as a compelling interest remains open. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently

'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.") (citing Bakke, 438 U.S. at 311-15).

B. Educational Diversity Considered in Light of Subsequent Supreme Court Authority

Plaintiffs argue that regardless of whether Justice Powell's opinion in Bakke is the holding of the Court, subsequent Supreme Court authority has made clear that governmental units may consider race only for remedial purposes. Because the Law School's program is not tailored to remedy past discrimination, but rather designed to foster diversity, plaintiffs argue that it is unconstitutional.[4]

The Supreme Court has held since Bakke that if certain conditions are met a state may consider race to remedy the effects of past discrimination. See Shaw v. Hunt, 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996). The issue presented by plaintiffs' motion for partial summary judgment, however, is whether post-Bakke Supreme Court cases have clarified that race may be considered ***only*** for remedial purposes.

In Part III-A of Justice O'Connor's plurality opinion in Croson, joined only by Justices Rehnquist, white and Kennedy, Justice O'Connor writes:

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[4] The Law School does not contend that its admissions policy was adopted to remedy the effects of past discrimination.

> Classifications based on race carry a danger of stigmatic harm. ***Unless they are strictly reserved for remedial settings***, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.

Croson, 488 U.S. at 493 (emphasis added). Plaintiffs argue that this statement makes clear that non-remedial race-conscious programs are unconstitutional. Plaintiffs argue further that Justice O'Connor's statement is the holding of the court because Justice Scalia stated in his concurring opinion that he agreed with much of Justice O'Connor's opinion.

Plaintiffs have misinterpreted the scope of Justice O'Connor's statement concerning remedial race-conscious programs. The issue of whether race could be considered for any purpose other than remediation was not before the Court, and Justice O'Connor never explicitly stated that remediation is the only compelling state interest that would justify race-conscious government action. Rather, this statement was merely one part of her lengthy explanation of why the Court needs to apply strict scrutiny review to all racial classifications.[5] To interpret this statement as creating a bright-line rule regarding remedial and non-remedial race-conscious programs is simply to read too much into Justice O'Connor's statement. In addition,

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[5] The Court notes that Justice O'Connor cited Justice Powell's opinion in Bakke as support for this principle. Justice Powell stated in Bakke that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." Bakke, 438 U.S. at 298.

while Justice Scalia did agreed with much of Justice O'Connor's opinion, particularly her conclusion that strict scrutiny must be applied to all racial classifications, he ***disagreed*** with Justice O'Connor's "***dictum*** suggesting that despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) 'to ameliorate the effects of past discrimination.'" Id. at 520 (emphasis added). Justice Scalia would not support the use of race for any purpose except to declassify racially classified state systems. Thus, he did not endorse Justice O'Connor's view that states may adopt race-conscious programs to remedy the effects of past discrimination.

The Supreme Court has never held that educational diversity cannot be a compelling state interest. In the absence of such a holding, this Court will follow Justice Powell's opinion in Bakke that educational diversity "is a constitutionally permissible goal for an institution of higher education." Bakke, 438 U.S. at 311-12. This Court declines to hold that recent cases, by implication, have overruled earlier Supreme Court precedent. Rather, this Court must follow the case which directly controls the issue, and leave to the Supreme Court the prerogative of overruling its own decisions. See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997).

While the Court concludes that Justice Powell's opinion in Bakke remains good law, it nevertheless must be considered together with all subsequent Supreme Court case dealing with racial preferences. In these cases, the

Supreme Court has subjected race-conscious programs of all sorts to the most exacting scrutiny possible. The Supreme Court's decisions in Croson and Adarand make plain that a majority of the Justices are highly skeptical of racial preferences and believe that the Constitution imposes a heavy burden of justification on their use. Thus, while educational diversity may be a compelling interest, the defendant's program must be subjected to rigorous scrutiny to determine whether it was narrowly tailored to achieve genuine educational diversity.

## II. Defendants' Motion for Summary Judgment

The Court denies the defendants' motion for summary judgment because questions of fact exist concerning whether the defendants followed a Harvard-type plan in making their admissions decisions. Until the Court hears the evidence concerning how the admissions decisions as to the three named plaintiffs were actually made by the defendants, the Court cannot determine whether there has been a constitutional violation. For the same reasons, the Court cannot determine at this time whether there was intentional discrimination under Title VI or whether the individual defendants are entitled to qualified immunity.

## III. Conclusion

The Court DENIES plaintiffs' motion for partial summary judgment and defendants' motion for summary judgment.

IT IS SO ORDERED.

DATED this 12th day of February, 1999.

/s/

THOMAS S. ZILLY

UNITED STATES DISTRICT JUDGE